(16,076)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 367.

GEORGE P. WETMORE ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID RYMER, SAM. RYMER, TOM PAYNE, AND W. CAL. McCONNELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

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1 THE UNITED STATES OF AMERICA, } ss:
Southern Division of the Eastern District of Tennessee,

Be it remembered that at a circuit court of the United States began and held for the southern division of the eastern district of Tennessee, at the Federal building, in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it being the 1st day of April, A. D. 1895—present and presiding, the Honorable Chas. D. Clark, district judge for the eastern and middle districts of Tennessee—among the proceedings had were the following, to wit:

GEORGE PEABODY WETMORE, V. K. STEVENSON, MATILDA C. ALLOWAY, HUGH STEVENSON, PAUL E. STEVENSON, ELOISE STEVENSON KERNOCHAN, and JAMES L. KERNOCHAN, Her Husband; MAXWELL STEVENSON, a Minor, Who Sues by His Next Friend, PAUL E. STEVENSON, Plaintiffs,
vs.
DAVID RYMER, SAM. RYMER, TOM PAYNE, W. CAL. MCCONNELL, Defendants. } No. 419.

Be it remembered that heretofore, to wit, on the 3rd day of October, A. D. 1891, came the plaintiffs, by their attorneys, and filed in the clerk's office of said court a certain declaration and cost
2 bond; which said declaration and cost bond are clothed in the words and figures following, to wit:

Declaration and Cost Bond.

The plaintiffs, George Peabody Wetmore, who is a citizen of the State of Rhode Island; Matilda C. Alloway, a citizen and resident of the State of Pennsylvania; V. K. Stevenson, Hugh Stevenson, Paul E. Stevenson, Eloise Stevenson Kernochan, and James L. Kernochan, her husband, and Maxwell Stevenson, by Paul E. Stevenson, his next friend, all of whom are citizens and residents of the State of New York, sue the defendants, David Rymer, Sam. Rymer, Tom Payne, and W. Calvin McConnell, all of whom are citizens and residents of Polk county, Tennessee, to recover the following-described lands, situate in the county of Polk, in the southern division of the eastern district of Tennessee, to wit:

In town. one, range three east, of the basis line, Ocoee district.

The south half of section one, the south half of section two, the northwest quarter of section eleven, all of section twelve, the southwest quarter of section thirteen.

In town. two, range four east, of the basis line, Ocoee district.

All of sections one and two and three and five and eight and nine and ten and eleven and twelve and thirteen and fourteen and fifteen and seventeen and twenty and twenty-one and twenty-two and twenty-three and twenty-four and twenty-five and twenty-
3 six and twenty-seven and twenty-eight and thirty-three and thirty-four and thirty-five, the north half and the southeast quarter of section six, the east half of section seven, the east half of section eighteen, the east half and the northwest quarter of section nineteen, the north half and the southeast quarter of section twenty-nine, the east half of section thirty-two, the west half of the west half of section thirty-six.

In town. one, range four east, of the basis line, Ocoee district.

All of sections thirty-one and thirty-five and thirty-six, the west half of section thirty-four.

As shown on the general plan of the Ocoee district of the State of Tennessee, to which and the grants for said land reference is made for full description.

Which lands are worth more than two thousand dollars and of which lands said plaintiffs were possessed, claiming in fee, before the commencement of this suit, and after said possession accrued the said defendants, on the first day of January, 1892, entered thereupon and unlawfully withhold and detain the same, together with one thousand dollars due for the detention thereof.

CHARLES SEYMOUR,
Attorney for Plaintiffs.

4 Know all men by these presents that we, George Peabody Wetmore, V. K. Stevenson, Matilda C. Alloway, Hugh Stevenson, Paul E. Stevenson, Eloise Stevenson Kernochan, James L. Kernochan, Maxwell Stevenson, by his next friend, Paul E. Stevenson, as principals, and Charles Seymour, as surety, are held and firmly bound unto David Rymer, Sam. Rymer, Tom Payne, W. Cal. McConnell in the penal sum of two hundred and fifty dollars; to the payment whereof we bind ourselves and each of us and each and every of our several heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands on this the 3rd day of January, 1894.

The condition of this bond is such that the said G. P. Wetmore, V. K. Stevenson, *et al.* commenced suit against D. Rymer, S. Rymer, T. Payne, and W. C. McConnell for land in ejectment.

Now, if the said Wetmore, Stevenson, *et al.* shall prosecute said suit with effect, or on failure thereof pay and satisfy all costs that may be adjudged against said plaintiffs in said cause, or on failure of said defendants, if convicted, to pay and satisfy said costs, if the

said plaintiffs shall pay the same, this bond to be void; otherwise to remain in full force and virtue.

Attest: GEORGE PEABODY WETMORE, [SEAL.]
V. K. STEVENSON, [SEAL.]
MATILDA C. ALLOWAY, [SEAL.]
HUGH STEVENSON, [SEAL.]
PAUL E. STEVENSON, [SEAL.]
ELOISE STEVENSON KERNOCHAN, [SEAL.]
5 JAMES L. KERNOCHAN, [SEAL.]
PAUL E. STEVENSON,
As Next Friend of Maxwell Stevenson, [SEAL.]
By CHARLES SEYMOUR, *Their Attorney.*
CHARLES SEYMOUR. [SEAL.]

Endorsed: Filed Feb. 23, 1894. Henry O. Ewing, deputy clerk.

6 And afterwards, to wit, on the 30th day of August, 1894, came the defendants, by their attorneys, and filed in the clerk's office of said court a certain plea; which said plea is in the words and figures following, to wit:

Plea.

And now comes the defendant David Rymer and for plea to plaintiffs' declaration says that he is not in possession of and does not claim and has not entered upon or been in possession of or claimed any part of the lands in said declaration described except the following-described lands, to wit: The southwest ¼ of section 17, the north ½ of section 20, the east ½ and southwest ¼ of section 18, and the northeast ¼ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Tennessee; and as to all the lands except those herein described this defendant here and now disclaims any and all interest, right, or title.

And for further plea in this behalf said defendant says that as to the said southwest ¼ of section 17, the north ½ of section 20, the east ½ and southwest ¼ of section 18, and the northeast ¼ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Polk county, Tennessee, he is not guilty in manner and form as the plaintiffs in their said declaration have alleged; and of this puts himself upon the country.

PRITCHARD, SIZER & BIBLE, *For Rymer.*

And the plaintiff- do the like.

CHARLES SEYMOUR, *Att'y.*

7 And for further plea said defendant says he has had, by himself and through those — whom he claims, seven years' adverse possession of the land- hereinbefore described, which have been granted by the State of Tennessee, holding the same by grants, conveyances, and other assurances of title purporting to convey an estate in fee, without any claim by action at law or suit in equity

commenced within that time and effectually prosecuted against him; and this he is ready to verify.

And for further plea in this behalf said defendant says that the plaintiffs have neglected for the said term of seven years to avail themselves of any title, legal or equitable, by action at law or suit in equity effectually prosecuted against the person in possession of the land hereinbefore described, and that the plaintiffs' right of action, if any they have, accrued more than seven years before the commencement of this suit; and this the defendant is ready to verify.

PRITCHARD, SIZER & BIBLE, *For Rymer.*

For replication to this plea the plaintiffs deny that the defendants are entitled to the benefit of the statute of limitations, and say that the right of action accrued within the period of seven years before the commencement of this suit; and of this they put themselves upon the country.

CHARLES SEYMOUR, *Att'y.*

Endorsed: Filed 30th day of Aug., 1894. Henry O. Ewing, deputy clerk.

8 And afterwards, to wit, on the 12th day of March, A. D. 1895, an entry was made upon the journal of said court; which said entry is clothed in the words and figures following, to wit:

Journal "D," p. 670.

Came the parties, by their attorneys, and came also a jury of good and lawful men, to wit:

James Payne, W. N. Hoge, F. P. Kelly, R. A. McClelland, A. W. Wilbur, Rob't Hambright, W. S. Edwards, W. S. Buckner, W. J. Austin, J. J Lowery, and Geo. Faulkner, who being duly elected, tried, and sworn to try the issues joined, and the evidence of the plaintiff- being closed, the defendant-, by attorney, moved the court to dismiss the plaintiffs' suit for want of jurisdiction, because it appears from the plaintiffs' own testimony that the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of two thousand dollars; but the court suspended action on said motion until the verdict of the jury should be rendered, and the defendant thereafter proceeded to introduce *his* evidence.

And the evidence all being heard and argument of counsel thereon, and the jury having received the charge of the court, upon their oath do say that they find the issues in favor of the plaintiff and assess their damage for the detention of the premises at one dollar.

It is therefore considered by the court that the plaintiffs, G. P. Wetmore and the Stevenson heirs, recover of the defendants the premises set out in the declaration, to wit:

In town. one, range four east, of the basis line, Ocoee district.

9 All of sections one and two and three and five and eight and nine and ten and eleven and twelve and thirteen and fourteen and fifteen and seventeen and twenty and twenty-one and twenty-two and twenty-three and twenty-four and twenty-five and twenty-six and twenty-seven and twenty-eight and thirty-three and thirty-four and thirty-five, the north half and the southeast quarter of section six, the east half of section seven, the east half of section eighteen, the east half and the northwest quarter of section nineteen, the north half and the southeast quarter of section twenty-nine, the east half of section thirty-two, the west half of the west half of section thirty-six.

In town. one, range four east, of the basis line, Ocoee district.

All of sections thirty-one and thirty-five and thirty-six, the west half of section thirty-four, together with said sum of one dollar, assessed as damages, and the costs of this suit, and writ of possession and execution are awarded accordingly.

But immediately upon the rendition of said verdict and judgment the court set them aside and sustained the defendants' motion to dismiss for want of jurisdiction, being of the opinion there is and was not at the commencement of this suit a substantial controversy between the plaintiffs and defendants involving as much as two thousand dollars.

It is therefore considered by the court that said verdict and judgment be, and the same are hereby, vacated and set aside and for nothing held, and that the plaintiffs and the sureties on their prosecution bond pay the costs of this suit, for which execution may issue.

10 To the action of the court in setting aside said verdict and judgment and dismissing said suit the plaintiffs except.

(Endorsed:) Ent., Journal "D," p. 670. Filed 12th day of Mar., 1895. Henry O. Ewing, deputy clerk.

11 And afterwards, to wit, on the 25th day of May, 1895, a certain bill of exceptions was filed in the clerk's office of said court; which said bill of exceptions is clothed in the words and figures following, to wit:

Bill of Exceptions.

This action of ejectment was tried before Judge Clark and a jury, at Chattanooga, Tennessee, on April 12, 1895.

Verdict and judgment were rendered for the plaintiffs, but before the verdict was rendered a motion to dismiss the suit was made for want of jurisdiction, and the court, after verdict and judgment, sustained the motion and set aside the verdict and judgment, dismissed the suit, and taxed the costs against the plaintiffs and sureties on their prosecution bond.

There was evidence tending to show that the plaintiffs had a perfect title to all the lands described in their declaration; the evidence on behalf of the defendant Rymer tended to show adverse possession for more than seven years' under color of title, of the lands claimed by him in his pleas. It is conceded that the charge of the court was correct, and that there was evidence sufficient to support the verdict and judgment if the court had jurisdiction, and the only question presented on appeal is the question of jurisdiction.

After the declaration and the plea had been read the counsel for defendant Rymer then stated to the court that he relied upon
12 the want of jurisdiction as a complete defense to the suit, because the matter in dispute, exclusive of interest and costs, was less than two thousand dollars. Counsel for the plaintiffs insisted that the question whether the court had jurisdiction, based on the insufficiency of the value of the matter in dispute, could only be presented by plea, and that as no plea had been filed the statement of the declaration as to the value of the matter in dispute controlled.

Plaintiff- *was* allowed to amend *his* declaration so as to state the citizenship, instead of the residence, of the parties.

It appeared in the plaintiffs' evidence that on the 12th day of March, 1877, they brought an action of ejectment in the United States circuit court for the northern division of the eastern district of Tennessee, including therein the same land now claimed by the defendant David Rymer; that on the 10th day of July, 1877, the defendant Rymer then filed therein a plea and disclaimer in the following words and figures:

Defendant's Disclaimer and Plea.

Circuit Court of the United States, Eastern District of Tennessee, July Term, 1877.

V. K. STEVENSON *et al.*
vs.
DAVID RYMER.

And now comes the defendant, David Rymer, by att'y, and disclaims title to all the lands sued for, described in the plaintiffs' declaration, except the northeast and southeast quarters of section 18 and the northeast quarter of section 19 and the northwest quarter of section 17, and as — the foregoing four quarters of land excepted from the foregoing disclaimed said def't for plea says that he is not guilty, in manner and form as the plaintiff *has*
13 alleged, of unlawfully withholding the same or any part or parcel of said lands from the plaintiff-; and of this the defendant puts himself upon the country.

BAXTER & SON,
Att'y- for Def't.

Endorsed: No. 634. V. K. Stevenson *et al. vs.* David Rymer. Defendant's disclaimer and plea. Filed July 10, 1877. H. M. Aiken, clerk.

On the 23rd day of July, 1881, verdict and judgment were rendered for the plaintiffs in said ejectment suit for all the lands described in their said declaration in said suit, including the lands described in the plea and disclaimer of the defendant Rymer.

It further appeared in the plaintiffs' evidence that on the 19th day of October, 1885, the present defendant, David Rymer, filed his original injunction bill in the chancery court at Benton, Polk county, Tenn., against G. P. Wetmore *et als.*, alleging therein that he was the owner of the northeast and southwest quarter- of section 17, the northeast quarter of section 19, and the northwest quarter of section 21, all in township two, range four east, of the basis line in the Ocoee district, in Polk county, Tennessee, seeking by said bill to set aside said judgment in said ejectment suit hereinbefore mentioned. Subsequently said suit in equity was removed on the petition of Geo. P. Wetmore to the circuit court of the United States for the northern division of the eastern district of Tennessee, and on October 16, 1886, said suit was dismissed on demurrer.

It further appeared in the plaintiffs' evidence that on the 1st day of April, 1886, a lease contract was entered into between the
14 plaintiffs, by their agent, Charles Seymour, and the defendant David Rymer in the following words and figures:

This contract made this 1st day of April, 1886, witnesseth: That G. P. Wetmore and V. K. Stevenson heirs have let and leased for the farming year of 1886 to David Rymer, and the said David Rymer, releasing all claims, takes as tenant to hold for and under said Wetmore and Stevenson, the following-described land in Polk county, Tennessee, Ocoee District survey: being the east half of section 18 and the north half of the southeast quarter of section 19 of township 2, range 4, east of said district, including where said Rymer lives. Said tenant agrees to pay one dollar a year rent, to cut no timber, except what is necessary for building and fences on the farm and not to sublet any part of the premises nor assign this lease without consent in writing of the lessor. This lease is to run on by the year unless notice is given before Christmas.

DAVID RYMER.
G. P. WETMORE AND HEIRS OF
V. K. STEVENSON,
By CHARLES SEYMOUR, *Att'y.*

Attest:
O. W. MULLER.
JOHN ROBERTS.

The plaintiffs only introduced one witness, Oscar W. Muller, a surveyor, who had surveyed the lands for the plaintiffs and who was one of the attesting witnesses to the lease. He, on cross-
15 examination by defendant's attorney, testified that the market value of the land was fifty cents per acre; that it was

wild or mountain land, and not worth more than that unless its prospective value was to be considered, and that the land described in the plea of the defendant Rymer was not worth $1,000.

The evidence tended to show that the defendant Rymer actually occupied some part of the land covered by his assurance of title, namely, a grant from the State of Tennessee, dated December 21, 1870, from the time he took possession in 1867, before the grant actually issued, to the present time; that he lived on the land and had some of it enclosed and in cultivation all the time.

There was no evidence to show that David Rymer ever claimed any more land than that now claimed by him in his plea in this cause, and it appeared in the evidence that his codefendants, Sam. Rymer, Tom Payne, and W. Cal. McConnell, were the tenants of the said David Rymer of land claimed by him in his said plea, and claimed no land except as such tenants.

This was all the evidence affecting the question of jurisdiction. At the conclusion of this and other evidence the defendant Rymer testifying, the defendant Rymer, by his counsel, moved to dismiss the suit because it appeared that the matter in dispute was of less value than $2,000, and that the suit for the large body of lands described in the declaration was colorable merely, and that there never had been a substantial controversy in which the matter in dispute exceeded the value of $2,000, and that it was so known to the plaintiffs at the time of bringing this suit.

The court announced that the verdict of the jury would be taken, and that the question of jurisdiction would then be passed upon, and that if the court should be of opinion that the court had
16 no jurisdiction the verdict would be set aside.

The defendant Rymer then introduced his proof.

The court charged the jury and a verdict was returned in favor of the plaintiffs, and the court pronounced judgment thereon.

Argument of counsel upon the question of jurisdiction was then heard, and the court gave leave to both parties to file affidavits showing the value of the lands in controversy between the plaintiffs and the defendant Rymer, until nine o'clock the next day. On the next day, to wit, April 13th, 1895, the plaintiffs' counsel produced and read to the court the following affidavits:

Affidavit of Charles Seymour.

In this cause, on leave of the court to file affidavits in respect to jurisdiction, comes Charles Seymour, who, having been duly sworn, declares on oath that he is the attorney and has been for twenty-five years the agent of what are known as the Wetmore and Stevenson lands, in Polk county, Tennessee, and that he is familiar with most of the lands and has been on the lands in dispute in this cause, and that the lands set out in the plea of the defendant lie on Lost creek and Little Lost creek and form a connecting way to many thousands of acres of land of the plaintiffs, which lie in that vicinity, and that the lands described in this plea are worth more than $2,000 on account of their location, and are not to be judged

by the general price for mountain land in the vicinity; that these lands lie near the foot of the Frog mountain, on the northwesterly side, where the timber is more than usually heavy and unusually valuable, both for accessibility and quality.

CHARLES SEYMOUR.

17 Subscribed and sworn to before me this 12th day of April, 1895.

JOHN B. PETTIS,
Dep. C., Dist. Ct.

(Endorsed:) Filed 12 day of April, 1895. Henry O. Ewing, deputy clerk.

Affidavit — I. B. Brock.

In this cause, on leave of the court to file affidavits in respect to jurisdiction, comes I. B. Brock, who, having been duly sworn, testifies as follows: I have lived in Polk county over forty years; was sheriff for six years and have herded cattle for about twenty-five years on and in vicinity of lands set out in defendant's plea, and I know the location of some twenty thousand acres lying near by, understood to be the property of Wetmore and Stevenson heirs, the plaintiffs in this suit; the lands described in the plea are worth much more than the ordinary mountain lands. I sold a quarter section of 160 acres lying a mile from the lands in the plea for $400.00, and the lands described in the plea are near the foot of the mountain, where the timber is better than on most of the mountain, and the way they lie, if I owned the Wetmore and Stevenson lands, I would not want to sell at all, as they are a part of a large boundary that would be needed for shelter for cattle off the mountain and for roadways, and control of the ways to the herding grounds or timber- work, or if mining be done would be in the way.

Not long before Dave Rymer took the lease in 1886 from Wetmore and Stevenson he offered to make me a deed for some
18 land a mile and a half from any land in his present plea in this suit.

I. B. BROCK.

Sworn to and subscribed before me this April 12th, 1895.

JOHN B. PETTIS,
Dep. Cl'k Dis. Ct.

(Endorsed:) Filed 12 day of Apr., 1895. Henry O. Ewing, deputy clerk.

Affidavit of O. W. Miller.

In this cause, on leave of the court to file affidavits in respect to jurisdiction, comes O. W. Miller, who, having been duly sworn, declares on oath that he has been county surveyor for Polk county, Tenn., for a number of years, and has surveyed the lands in dispute in this cause, and also surrounding lands. While I value the

mountain land as a whole at fifty cents per acre, the land in litigation, lying on the waters of Lost creek and Little Lost creek at the foot of the mountain, forms part of a connected body of land of about twenty-five thousand acres, and forms a gateway and outlet to this body for timber and stock to the Hiwassee river and railroad, without which the rest of the body would be materially reduced in value, say from 10 to 20 cents per acre. To cut this off and permanently block this approach would reduce the value of the whole from two to four thousand dollars.

A plat or sketch is attached showing the lands belonging to complainants in the 2 township of range 4 E., Ocoee district.

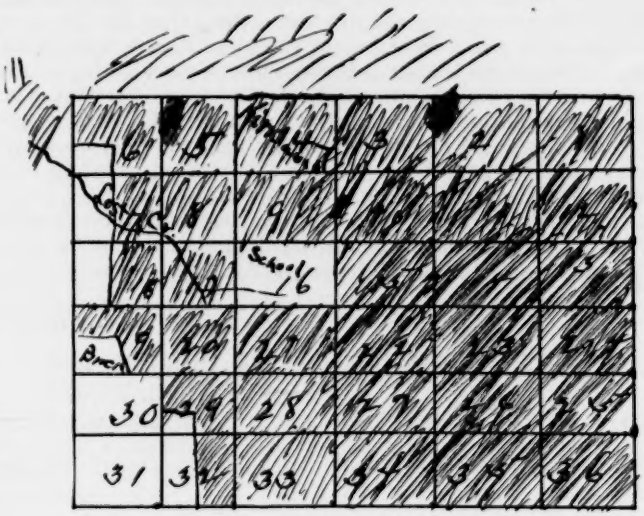
O. W. MILLER.

Subscribed and sworn to before me this 12th of April, 1895.

19 JOHN B. PETTIS,
Dep. Cl'k Dist. Ct.

(The following is approximately a copy of diagram exhibited in the affidavit, the clerk not having been furnished with copy of same for use in this transcript.)

Lands shaded belong to Wetmore & Stevenson.



Town. 2, R. 4 E., Ocoee dist., Polk county, Tenn.

O. W. MILLER.

(Endorsed:) Filed 12th day of Apr., 1895. Henry O. Ewing, deputy clerk.

The defendants' counsel objected to the introduction of these affidavits for the following reasons, to wit:

1. Because affidavits are not admissible after verdict and judgment.

2. Because the value of the matter in dispute appears in the record as made by the parties on trial, and affidavits can only be received where the record is silent as to the question of the value of the matter in dispute.

3. Because, as proof was heard upon the question of value,
20 affidavits should not be looked to when the defendants are not given an opportunity to cross-examine or to produce counter-affidavits.

4. Because the actual market value of the matter in dispute fully appears in the plaintiffs' own evidence, and the market value of the matter in dispute, and not any contingent or prospective value or collateral effect upon other property owned by the plaintiffs and not in dispute, can be considered in determining the question of jurisdiction.

But the court allowed the affidavits to be filed.

Upon consideration of the evidence heard on the trial and of the affidavits produced by plaintiffs' counsel, the court was of opinion that the value of the matter in dispute was less than $2,000, and that there was not at the commencement of the suit and is not now a substantial controversy between the parties of sufficient value to be within the jurisdiction of the court.

The court therefore sustained defendants' motion to dismiss the suit for want of jurisdiction, and judgment was accordingly entered setting aside the verdict and judgment in favor of the plaintiffs, dismissing the suit for want of jurisdiction and rendering judgment for costs against the plaintiffs and the sureties in their prosecution bond.

The plaintiffs excepted to this action of the court and tendered this their bill of exceptions, which was signed, sealed, and made part of the record within the time stipulated by counsel.

This 14th day of May, 1895.

C. D. CLARK, *Judge.*

21 (Endorsed:) Filed May 25, 1895. Henry O. Ewing, deputy clerk.

And afterwards, to wit, on the 13th day of June, A. D. 1895, came the plaintiffs, by their attorney, and filed in the clerk's office of said court a certain petition for writ of error; which said petition for writ of error is clothed in the words and figures following, to wit:

Petition for Writ of Error.

And now comes George Peabody Wetmore *et als.*, plaintiffs herein, and say that on or about the 12th day of April, 1895, this court entered judgment herein in favor of the defendants and against these plaintiffs, in which judgment and the proceedings had prior

thereunto in this cause certain errors were committed, to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these plaintiffs pray that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Supreme Court.

CHARLES SEYMOUR,
Att'y for Plaintiffs.

(Endorsed:) Filed June 13, 1895. Henry O. Ewing, deputy clerk.

22 And afterwards, to wit, on the 13th day of June, A. D. 1895, the plaintiffs, by attorney, filed in the clerk's office of said court a certain assignment of errors; which said assignment of errors is clothed in the words and figures following, to wit:

Assignment of Errors.

In this cause, being upon writ of error from the final judgment dismissing suit of complainants for the tract of land described in the declaration, come the complainants, G. P. Wetmore, V. K. Stevenson, Matilda Alloway, Eloise Kernochan, James L. Kernochan, Paul E. Stevenson, and Maxwell Stevenson, by his next friend, Paul E. Stevenson, and say that in the records and proceedings in the within-entitled cause there is manifest error, to their injury and to the injury of each of them, and for cause thereof they assign the following grounds:

I.

The court erred in adjudicating that the value of the land in controversy was less than two thousand dollars, and that it had no jurisdiction of the cause, when it clearly appeared from the proof that the land was worth from two thousand to four thousand dollars as a part of the tract belonging to the plaintiffs and sued for in the declaration, and that it was only when cut off from the remainder of the tract sued for and separated from plaintiffs' land that the 900 acres of land set out in the plea became worth less than two thousand dollars, and when considered with regard to prospective value; and—

23 II.

That the court erred in dismissing the suit for want of jurisdiction.

Wherefore said appellants pray a reversal of said judgment.

CHARLES SEYMOUR,
Att'y for Plaintiff-.

(Endorsed:) Filed June 13, 1895. Henry O. Ewing, deputy clerk.

And afterwards, to wit, on the 13th day of June, A. D. 1895, came the plaintiffs, by their att'y, and filed in the clerk's office of said court a certain bond on writ of error; which said bond on writ of error is clothed in the words and figures following, to wit:

Bond on Writ of Error.

Know all men by these presents that we, George Peabody Wetmore, V. K. Stevenson, Matilda C. Alloway, Hugh Stevenson, Paul E. Stevenson, Eloise Stevenson Kernochan, James L. Kernochan, and Maxwell Stevenson, as principals, and Charles Seymour, as security, are held and firmly bound unto the defendants, David Rymer, Sam. Rymer, Tom Payne, and W. Cal. McConnell, in the full and just sum of five hundred dollars, to be paid to the said defendants, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly, to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

24 Whereas lately, at a circuit court of the United States for the southern division of the eastern district of Tennessee, in a suit depending in said court between George Peabody Wetmore *et al.*, plaintiffs, and David Rymer, Sam. Rymer, Tom Payne, and W. Cal. McConnell, defendants, a judgment was rendered against the said George P. Wetmore *et al.*, and the said George P. Wetmore *et al.* having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said David Rymer, Sam. Rymer, Tom Payne, and W. Cal. McConnell, citing and admonishing *him* to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October, 1895:

Now, the condition of the above obligation is such that if the said George P. Wetmore *et al.* shall prosecute said writ of error to effect and answer all damages and costs if *he* fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE PEABODY WETMORE. [SEAL.]
V. K. STEVENSON. [SEAL.]
MATILDA C. ALLOWAY. [SEAL.]
HUGH STEVENSON. [SEAL.]
PAUL E. STEVENSON. [SEAL.]
ELOISE STEVENSON KERNOCHAN. [SEAL.]
MAXWELL STEVENSON, [SEAL.]
Next Friend, Paul E. Stevenson,
By CHARLES SEYMOUR, *Att'y.*
CHARLES SEYMOUR. [SEAL.]

Approved:
C. D. CLARK, *Judge.*

25 (Endorsed:) Filed June 13, 1895. Henry O. Ewing, deputy clerk.

26 *Writ of Error.*

Supreme Court of the United States.

UNITED STATES OF AMERICA:

The President of the United States to the honorable judge of the circuit court of the United States for the southern division of the eastern district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between George Peabody Wetmore *et al.*, plaintiffs, and David Rymer, Sam. Rymer, Tom Payne, and W. Cal. McConnell, defendants, a manifest error hath happened, to the great damage of the said George P. Wetmore *et al.*, plaintiffs, as by their complaint appears, we, being willing that error, if any hath been made, should be duly corrected and full and speedy justice done to the parties aforesaid in their behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington the 12th day of July next *next*, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

27 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and the Independence of the United States of America the one hundred and nineteenth.

HENRY O. EWING,
Deputy Clerk.

Allowed:
C. D. CLARK, *Judge.*

In obedience to this writ transcript of the record is herewith tendered.

HENRY O. EWING,
Deputy Clerk.

[Endorsed:] No. 419. In the U. S. circuit court at Chattanooga. George Peabody Wetmore *et al.* against David Rymer *et al.* Writ of error.

28 *Citation.*

Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To David Rymer, Sam. Rymer, Tom Payne, and W. Cal. McConnell, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the 12 day of July next, pursuant to a writ of error filed in the clerk's office of the circuit court for the southern division of the eastern district of Tennessee, at Chattanooga, wherein George Peabody Wetmore *et al.* are plaintiffs in error and you defendants in error, to show cause, if any there be, why the judgment rendered against these said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and the Independence of the United States of America the one hundred and nineteenth.

CHAS. D. CLARK, *Judge.*

I hereby this — day of June, 1895, accept due personal service of this citation on behalf of David Rymer, Sam. Rymer, Tom Payne, and W. Cal. McConnell.

(See reverse side this page.)

28½ Service acknowledged this June 17, 1895.

PRITCHARD, SIZER & BIBLE,
For David Rymer.

29 UNITED STATES OF AMERICA, } *ss:*
Southern Division of the Eastern District of Tennessee, }

I, H. H. Taylor, clerk of the circuit court of the United States for the district and division aforesaid, do hereby certify the above and foregoing to be a full, true, and complete transcript of the proceedings had by and before said court in the cause of George Peabody Wetmore *et al. vs.* David Rymer *et al.*, No. 419 in said court, as the same appears of record and on file in the clerk's office of said court.

The Seal of the United States Circuit Court, District of East Tenn., Southern Div'n.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Chattanooga, Tennessee, this 21st day of June, A. D. 1895.

H. H. TAYLOR, *Clerk,*
By HENRY O. EWING,
Deputy Clerk.

Endorsed on cover: Case No. 16,076. E. Tennessee C. C. U. S. Term No., 367. George P. Wetmore *et al.*, plaintiffs in error, *vs.* David Rymer, Sam. Rymer, Tom Payne, and W. Cal. McConnell. Filed October 24, 1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 76.

GEORGE P. WETMORE ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID RYMER ET AL., DEFENDANTS IN ERROR.

WRIT OF ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is an action of ejectment brought in the circuit court for the eastern district of Tennessee to recover a large block of land.

The declaration (Transcript, p. 2) alleges that the land is worth more than two thousand dollars.

The real defendant (the others were merely tenants) (Transcript, p. 8) pleaded as to part of the land that he was

not in possession and disclaimed title thereto, and as to the remainder pleaded not guilty and adverse possession for the statutory period. (Transcript, pp. 3 and 4.)

The jury found for the plaintiffs, and judgment was rendered on their verdict that the plaintiffs recover all the lands described in the declaration. (Transcript, pp. 4 and 5.)

After the rendition of the judgment the court took under consideration a motion to dismiss for lack of jurisdiction made during the trial, action upon which had been deferred. (Transcript, pp. 4, 5, 6, 8.)

At the time when the defendant first stated that he intended to seek to take advantage of the alleged defect of jurisdiction the plaintiffs contended that the point could be raised only by plea to the jurisdiction, and had been waived by pleading to the merits and going to trial (Transcript, p. 6). On taking up this motion, after judgment, the court heard arguments thereon and gave the parties until 9 o'clock the next day to file affidavits as to value. At the time named the affidavits were presented. Thereupon the court sustained the defendants' motion to dismiss, set aside the verdict and judgment, and rendered judgment for the defendants on the ground (p. 11) that "upon consideration of the evidence heard on the trial and of the affidavits produced by the plaintiffs' counsel the court was of opinion that the value of the matter in dispute was less than $2,000, and that there was not at the commencement of the suit and is not now a substantial controversy between the parties of sufficient value to be within the jurisdiction of the court."

The plaintiffs excepted, and the case is before this Court on writ of error as to the jurisdictional question only under

act of March 3, 1891. (26 Stat. at L., 826, sec. 5; McLish *vs.* Roff, 141 U. S., 661; 35 L. ed., 893; Schunk *vs.* Moline, &c., Co., 147 U. S., 500; 37 L. ed., 255.)

POINTS.

I.

The court erred in entertaining the motion to dismiss.

By pleading to the merits and going to trial the defendant waived his right to object to the jurisdiction. Such objection can only be made on a plea to the jurisdiction.

Wood *vs.* Mann, 1 Sumn., 578.
Smith *vs.* Kernochen, 7 How., 198, 216.
Varner *vs.* West, 1 Woods, 493.
Evans *vs.* Davenport, 4 McLean, 574.
D'Wolf *vs.* Rabaud, 1 Pet., 476, 498.
Fife *vs.* Bohlen, 22 Fed. Rep., 878.
Cuthbert *vs.* Galloway, 35 Fed. Rep., 466.
Davis *vs.* Lathrop, 13 Fed. Rep., 565.
Evans *vs.* Gee, 11 Pet., 80, 83.

This rule has not been altered by the act of 1875 (18 Stat. at L., 472, sec. 5; Suppl., p. 83), giving the court power to dismiss suits not within its jurisdiction, as defined by law. (Act of August 13, 1888, 25 Stat. at L., 433; Suppl., p. 611, amending act of March 3, 1887, 24 Stat. at L., 552.)

Imperial Refining Co. *vs.* Wyman, 38 Fed. Rep., 577.

While a party cannot confer jurisdiction upon a court, he may estop himself from asserting facts affecting jurisdiction.

"Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission."

Mr. Chief Justice Waite in Pittsburgh, C. & St. L. R'y Co. *vs.* Ramsey, 22 Wall., 322; 22 L. ed., 823.

The allegation of a value in excess of $2,000 was admitted by the failure of the defendant to deny it.

This is in accordance with the general rules of pleading (Deputron *vs.* Young, 134 U. S., 241; 33 L. ed., 923, 928) and is the law in Tennessee.

West Tenn. Agric., &c., Ass'n *vs.* Madison, 9 Lea (Tenn.), 407, 409.

Vincent *vs.* Vincent, 1 Heisk. (Tenn.), 333, 335.

Boyd *vs.* Martin, 9 Heisk. (Tenn.), 382.

Caruther's History of a Law Suit (Tenn., 2d ed.), p. 191, sec. 100.

"Whatever is not denied in pleading is virtually admitted."

Cook *vs.* Taylor, 2 Tenn., 49, 52.

"All allegations in the declaration not denied in the plea shall be taken as true for all purposes of that issue."

Tennessee Code (M. & V.), sec. 3620.

"The Supreme Court shall not dismiss any suit for matters of form or for want of jurisdiction over the subject-matter in the court in which the action was instituted, unless exception was properly taken by demurrer to the want of jurisdiction in the court below."

Tennessee Code (M. & V.), sec. 3585.

Being the same as the common law upon this point, the Tennessee practice will control.

Deputron *vs.* Young, 134 U. S., 241; 33 L. ed., 923, 928.

This is not a mere technical point; it is essential to secure fairness and prevent surprise.

Being admitted, the jurisdictional facts are binding upon both parties. Their truth can be inquired into only by the court in protecting its jurisdiction.

The act of 1875 (18 Stat. at L., 472) greatly extended the jurisdiction of the court with reference to suits by assignees. In order to guard against pretended assignments section 5 was inserted, providing that in case it appeared "to the satisfaction" of the court that the suit did not really and substantially involve questions within its jurisdiction the suit should be dismissed.

Williams *vs.* Nottawa, 104 U. S., 209; 26 L. ed., 719;
Hartog *vs.* Memory, 116 U. S., 588; 29 L. ed., 725,

where the Court, speaking by Mr. Chief Justice Waite, said:

"It was well settled before the act of 1875 that when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the face of the record evidence to contradict the record was not admissible except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction (Farmington *vs.* Pillsbury; *ante*, 114, and cases there cited). In its general scope this rule has not been altered by the act of 1875, but before that act was passed it had been held that the rule prevented the courts from taking notice of colorable assignments or transfers to create cases for the jurisdiction of the courts of the

United States in the absence of a plea in abatement or to the jurisdiction, and as that act 'opened wide the door for frauds upon the jurisdiction of the court by collusive transfers so as to make colorable parties and create cases cognizable by the courts of the United States,' we held in Williams *vs.* Nottawa, 104 U. S., 209, 211 (Bk, 26, L. ed., 719, 720), that the statute changed the rule so far as to allow the court at any time, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered."

This provision is not one for the benefit of negligent parties, but is to be restricted in its application to suits fraudulently or collusively brought or removed.

Davis *vs.* Lathrop, 13 Fed. Rep., 565.

It was, however, liable, if misconstrued, to work great injustice. The claim was made that a defendant could, as here, plead to the merits, by implication admitting the jurisdictional facts, and on the trial surprise the plaintiff with an issue that he had no reason to expect or be prepared to meet.

The leading case of Hartog *vs.* Memory, 115 U. S., 588; 29 L. ed., 725, has determined the practice and put a construction on the act which at the same time protects the court from frauds upon its jurisdiction and the plaintiff from unfair surprise. It holds that there may be a dismissal:

1st, where the court, having reason to suspect a fraud upon its jurisdiction, has inquired and found that such was the fact; and,

2d, when a lack of jurisdiction appeared from facts properly admitted on the issues made by the pleadings.

In Hartog *vs.* Memory this Court held that a dismissal by the circuit court was erroneous, no fraud on the jurisdiction being found, and the evidence showing lack of jurisdiction being inadmissible under the issues in the case.

Waiving, for the purpose of comparison only, our contention that no lack of jurisdictional value was shown in the case at bar, a striking similarity exists between it and Hartog *vs.* Memory.

In neither case was any fraud or collusion shown or found to exist. In both cases the evidence showing the alleged lack of jurisdiction had no bearing on the issues. In neither would a careful preparation for the trial prepare the plaintiff to meet it. In Hartog *vs.* Memory the Court say:

"Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party.

"If in the course of a trial it appears by evidence which is admissible under the pleadings and pertinent to the issues joined that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit.

"In Williams *vs.* Nottawa the record showed that one of the issues to be tried was whether Williams, the plaintiff, was the real holder and owner of the bonds sued on, and the evidence showing the collusion, for which we ordered the suit to be dismissed, was all material and pertinent to that issue; and in Farmington *vs.* Pillsbury (*supra*) one of the defenses was that Pillsbury, the plaintiff, was not the *bona fide* holder of the coupons in suit, but that they were placed in his hands for the purpose of being sued on in the courts of the United States. The case came here on special findings applicable to that issue, and what we then said was in answer to the question certified on those findings.

"Beyond this, no doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.

"But the evidence on which the circuit court acts in dismissing the suit must be pertinent either to the issue made by the parties or to the inquiry instituted by the court, and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this Court for the review of the order of dismissal. (Barry *vs.* Edmunds, just decided, *post*, 729.)

The case of Morris *vs.* Gilmer, 129 U. S., 315; 32 L. ed., 691, is clearly distinguishable from Hartog *vs.* Memory and from the case at bar. In that case the jurisdictional point was raised not at the trial, but at a time before. The plaintiff expected it and had every opportunity to prepare to meet it.

II.

The court erred in considering only the value of the land described in the plea and excluding the rest of the land.

All of the land described in the declaration was included in the "matter in dispute." The plea of not in possession did not dispose of the question as to the land included in it. It raised an issue as truly as did the pleas as to the remainder of the land.

The plaintiff alleged possession; the defendant denied it; the plaintiff thereupon filed his similiter.

This presented an issue which was evidently passed upon by the jury, for their verdict covered all the land described in the declaration (Transcript, pp. 4 and 5), although by the law of Tennessee a verdict and judgment for a part only may be rendered. (Tenn. Code, M. & V., sec. 3970.)

"If the defendant disclaims as to all or part of the land sued for, the burden is on the plaintiff to show the defendant's possession or claim of ownership."

Caruther's History of a Lawsuit (Tenn., 2d ed.), p. 198, sec. 107.

The remark of Mr. Justice Brewer in a case where it was sought to show that a claim upon which, as here, judgment was entered was colorable only is appropriate:

"That its claim was not merely specious is shown by the fact that after a contest it did recover a judgment for the full amount that it claimed."

Schunk *vs.* Moline, Milburn & Stoddart Co., 147 U. S., 500; 37 L. ed., 255.

A defendant cannot avoid an issue by disclaiming.

Isham *vs.* Miller, 44 N. J. Eq., 61.
Glassington *vs.* Thwaites, 2 Russ., 458.
Ellsworth *vs.* Curtis, 10 Paige Ch. (N. Y.), 105.

It is true that a disclaimer may estop the defendant, but the plaintiff is entitled to a judgment upon which an execution can be issued. A writ of possession cannot be issued on an estoppel. The injustice of depriving a plaintiff of his judgment is as obvious as that of allowing a defendant to defeat jurisdiction by refusing to contest part of the claim.

The right to judgment in Tennessee is a substantial one, and judgment in ejectment is there conclusive as to title so far as the parties are concerned.

Tenn. Code (M. & V.), sec. 3983.

That the action of ejectment in Tennessee is intended to be used as a means of definitely and directly settling title appears from the fact of its extension by statute, so that a judgment can be had not only against a defendant in possession, but against any one claiming an interest in the land. This makes the right of the plaintiff to judgment the more evident.

Tenn. Code (M. &. V.), sec. 3955.
Also Langford *vs.* Love, 3 Sneed (Tenn.), 308.
Smith *vs.* Lee, 1 Cold. (Tenn.), 549.

The fact that defendant does not contest part of a valid claim does not reduce the amount in dispute; otherwise

there could never be a judgment by default and the defendant could defeat jurisdiction in any case.

Foster's Federal Practice (2d ed.), sec. 16, p. 35; sec. 293, p. 537.

Fuller *vs.* Met. Life Ins. Co., 37 Fed. Rep., 167.

Riggs *vs.* Clark, 71 Fed. Rep., 560; 18 C. C. A., 242.

Even if a legal defense appears upon the face of the declaration, the jurisdiction will not be affected.

Schunk *vs.* Moline, Milburn & Stoddart Co., 147 U. S., 500; 37 L. ed., 255.

III.

The court erred in holding that the land described in the plea was not worth more than $2,000.

The only evidence was that of the witness Muller and the affidavits of said Muller, I. B. Brock, and Charles Seymour.

These affidavits were properly admitted and considered by the court.

Foster's Federal Prac., sec. 481, p. 1029.

Elgin *vs.* Marshall, 106 U. S., 578.

Carr *vs.* Fife, 156 U. S., 494; 39 L. ed., 508.

Hartog *vs.* Memory, 116 U. S., 588; 29 L. ed., 725.

Wilson *vs.* Blair, 119 U. S., 387; 30 L. ed., 441.

Street *vs.* Ferry, 119 U. S., 385; 30 L. ed., 439.

Davie *vs.* Heyward, 33 Fed. Rep., 93.

Rector *vs.* Lipscomb, 141 U. S., 557; 35 L. ed., 857.

Morris *vs.* Gilmer, 129 U. S., 315; 32 L. ed., 690.

U. S. *vs.* Union, 4 Cr., 216.

Williams *vs.* Kincaid, 4 Dall., 20.

Course *vs.* Stead, 4 Dall., 22.

This testimony was—

1st. That of Muller on cross-examination, which was "that the market value of the land was fifty cents per acre; that it was wild or mountain land and not worth more than that unless its prospective value was to be considered, and that the land described in the plea of the defendant Rymer was not worth $1,000." (Transcript, p. 8.)

2d. That of Muller in affidavit (Transcript, p. 9), explaining his testimony in court and stating that, while he values mountain land as a whole at fifty cents an acre, this land "forms part of a connected body of land of about 25,000 acres and forms a gateway and outlet to this body for timber and stock to the Hiwassee river and railroad, without which the rest of the body would be materially reduced in value, say from ten to twenty cents per acre. To cut this off and permanently block this approach would reduce the value of the whole from two to four thousand dollars."

3d. The testimony of Charles Seymour (Transcript, p. 8) that the lands set out in the plea "lie on Lost creek and Little Lost creek and form a connecting way to many thousands of acres of land of the plaintiffs which lie in that vicinity, and that the lands described in this plea are worth more than $2,000 on account of their location and are not to be judged by the general price for mountain land in the vicinity; that these lands lie near the foot of the Frog mountain on the northwesterly side, where the timber is more than usually heavy and unusually valuable, both for accessibility and quality."

4th. The affidavit of I. B. Brock (Transcript, p. 9) that the land is worth much more than ordinary mountain land, "as they are part of a large boundary that would be needed for shelter for cattle off the mountain and for roadways and control of the ways to the herding grounds or timber-work, or, if mining be done, would be in the way."

REASONS.

First. The opinion of the trial court is not supported by the facts of record.

In dismissing a case the discretion of the court is legal, not personal. Sufficient facts to justify the action must appear of record; otherwise this Court will reverse the judgment.

Foster's Federal Practice (2d ed.), sec. 293, p. 535;
Barry *vs.* Edmunds, 116 U. S., 550; 29 L. ed., 729;

where the Court, by Mr. Justice Matthews, said:

"In making such an order, therefore, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court; but upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said circuit court.'"

The above case is approved in—

Deputron *vs.* Young, 134 U. S., 241, 252; 33 L. ed., 923, 929.

When the jurisdictional allegations have been made and impliedly admitted, the burden of disproving jurisdiction is on the one attacking it.

If the allegations show jurisdiction, all presumptions are in its favor. "No court is to be ousted of its jurisdiction by implication."

Sullivan *vs.* Vail, 42 Conn., 90, 93 (per Foster, J.).

"It is undoubtedly true that until it is in some way shown by the records that the sum demanded is not the matter in dispute that sum will govern in all questions of jurisdiction."

Hilton *vs.* Dickinson, 108 U. S., 174; 27 L. ed., 688, 691.

Bowman *vs.* C. & N. W. R'y Co., 115 U. S., 611; 29 L. ed., 502.

In order to justify a court in dismissing a case it must be "legally certain" that the value or the damages, as the case may be, do not come within the jurisdictional limit.

This is the adjudicated meaning of the term "to the satisfaction of the said circuit court" used in the act of 1875.

Ch. 137, sec. 5, 18 Stat. at L., 472.

Barry *vs.* Edmunds, 116 U. S., 550; 29 L. ed., 729.

Wherever damages are not liquidated by the law it cannot be said that it is legally certain that they will not exceed a certain sum, and, no fraud or bad faith being shown

and it not appearing that the claim is colorable only, the claim of the plaintiff will control.

Foster's Federal Practice, sec. 16, p. 33.
Wilson *vs.* Daniel, 3 Dall., 401, 407.
Barry *vs.* Edmunds, 116 U. S., 550; 29 L. ed., 729.
Smith *vs.* Greenhow, 109 U. S., 669; 27 L. ed., 1080

Value of timber range and mining land is in its nature uncertain, and the claim of the plaintiff should have great weight.

There is nothing in the record to show that the court did not regard the land as worth $1,999, and that the alleged overvaluation was not made in good faith.

There was abundant evidence of a value above the jurisdictional amount to justify the court in denying the motion.

Second. The evidence showed that the value was sufficient.

Market price is only one element in value.

1 Sedgwick on Damages (8th ed.), sec. 243.
Harvey *vs.* Grant, 52 N. H., 569, 581.

It is not even an essential one.

Sparrow *vs.* Strong, 3 Wall., 97.

Value in use is to be considered as well as selling value.

1 Sedgwick on Damages (8th ed.), sec. 251.
Denver, S. P. & P. R. R. Co. *vs.* Frame, 6 Colo., 382, 385.
Fairfax *vs.* R. R. Co., 73 N. Y., 167.
Montana R. R. Co. *vs.* Warren, 6 Mont., 275, 284.

The value of property to the owner is to be considered.

Bradley *vs.* Gamelle, 7 Minn., 331.

Drake *vs.* Auerbach, 37 Minn., 505.

This is always done in eminent-domain cases under statutes allowing "just compensation" for property taken. "Just compensation" is nothing more than the law aims at in all actions, and these cases are fair precedents to the case at bar.

In such cases, where a part of a tract is taken, its value is that in connection with the rest of the land.

Lewis on Eminent Domain, secs. 464, 471.

Mills on Eminent Domain (2d ed.), secs. 462, 475, *et seq.*

Somerville & Easton R. R. Co. *vs.* Dougherty, 22 N. J. L., 495, 503.

Indiana B. & W. R'y Co. *vs.* Alling, 100 Ind., 409.

Virginia & Tucker R. R. Co. *vs.* Henry, 8 Nev., 165.

Dearborn *vs.* Boston, Concord & Montreal R. R. Co., 24 N. H., 79.

Petition Mount Washington Road Co., 35 N. H., 134.

Albany & Susquehanna R. R. Co. *vs.* Dayton, 8 Abb. Pr., N. S. (N. Y.), 182.

B. & O. R. R. *vs.* P., W. & B. R. R. Co., 17 W. Va., 812, 858.

Central Br. U. P. R'y Co. *vs.* Andrews, 26 Kans., 702.

Miss. Riv. Bd. Co. *vs.* Ring, 58 Mo., 491, 496.

Cummings *vs.* Williamsport, 84 Pa. St., 472.

In injunction cases the injury to the owner is the criterion.

Herbert *vs.* Rainey, 54 Fed. Rep., 248, 251.

Clapp *vs.* Spokane, 53 Fed. Rep., 516.

W. U. Tel. Co. *vs.* Charleston, 56 Fed. Rep., 419.

Third. But the normal market value of this land was sufficient.

The error consisted in seeking to determine its value by comparing it with land differently situated; in other words, by considering it by itself and disregarding its connection with other lands.

Land, unlike commodities, gets its value principally from its location. All its value must come from one or both of two sources:

1st. From what it yields of itself and by itself in the way of crops, minerals, etc., or as affording a desirable place of residence; and

2d. Its usefulness in connection with other land.

The latter element is by far the more important. The land in the heart of a great city owes to it almost all of its high value.

The land in controversy has great value because it furnishes the access to lands beyond.

If the 25,000 acres constituted the site of a commercial city it would be some six miles square, and if the land described in the plea constituted all of the land fronting on harbor, would the value of that acreage be the same as average land?

In case of a city lot worth a dollar per square foot and an adverse claimant with shanty in its corner claiming the whole, in suit could the occupant disclaim all of the square except a corner, his occupation of which would spoil the whole lot, and claim that this corner at average price per foot was below the jurisdiction of the court?

All the elements, not only of value, but even of market price, are here. *Market price* is defined:

"The market value of land is not necessarily, as sometimes seems to be supposed, the price which it would bring in forced sale by public auction. It is estimated upon fair consideration of the location of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken in connection with the general selling price of lands. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve may be regarded as the market value."

Pittsburgh, V. & Charleston R'y Co. *vs.* Vance, 115 Pa. St., 325, 331 (per Clark, J.).

It has also been defined as what property "would bring at a fair public sale when one party wanted to sell and the other to buy."

Lawrence *vs.* Boston, 119 Mass., 126; which case held also that the tribunal might consider what the parties would give.

See also—

Memphis *vs.* Bolton, 9 Heisk. (Tenn.), 508;

Woodfolk *vs.* N. & C. R. R. Co., 2 Swan (Tenn.), 437;

L. R. J. R'y *vs.* Woodruff, 49 Ark., 381, 390;

where McSplain, J., defines market price as "the highest price which those having the ability and the occasion to buy are willing to give." This case further lays down the principle that it is the price to be obtained, not at auction, but at private sale, with sufficient time for inquiry.

In Somerville & Easton R. R. Co. *vs.* Dougherty, 22 N. J. L., 495, 503, where the true question was said to be, "What was their true intrinsic value in the hands of a man who could select the time and fix the conditions of his sales?"

Also:

"In estimating the market value of the land everything which gives it intrinsic value is a proper element for consideration."

Shenango & A. R'y Co. *vs.* Braham, 79 Pa. St., 447, 453 (per Paxton, J.).

In determining value not only the present use of the land but its capabilities are to be considered. The value of land depends on the use to which it is adapted and is reasonably apt to be put.

Boom Co. *vs.* Patterson, 98 U. S., 403; 25 L. ed., 206.

Ellington *vs.* Bennett, 59 Ga., 286.

Haslan *vs.* Galena, &c., R'y, 64 Ill., 353.

Miss. R. Br. Co. *vs.* Ring, 58 Mo., 491.

King *vs.* Minneapolis Union R'y Co., 32 Minn., 224.

Pittsburgh V. & Charleston R'y Co. *vs.* Vance, 115 Pa. St., 325, 331.

L. R. J. R'y *vs.* Woodruff, 49 Ark., 381, 490.

It is obvious that the evidence of a value less than $2,000 had no bearing on land situated as this was.

The general price of "mountain land" is as indefinite as would be the general price of "city land." It would depend entirely on its location.

Muller's testimony on the stand, even taken by itself, was merely to the effect that for its present use, considered

merely as a lot of land, it was worth less than one thousand dollars. Considered in connection with his affidavit, it merely meant that here was a boundary of mountain land worth, at the usual rate for mountain land, an amount less than that required for jurisdiction. As a matter of fact, that land was, so far as it appeared, never sold. No piece like it in location existed.

Fourth. The value of the real object of the suit determines jurisdiction.

Thus in a suit to quiet title the value of the land determines jurisdiction. Land with an uncertain title, open to attack at any minute, has no real value.

Lehigh Zinc & Iron Co. *vs.* New Jersey Zinc & Iron Co., 43 Fed. Rep., 545;

where Mr. Justice Bradley said:

"The value of the matters involved in the controversy is to be found in the value of the property, the possession or enjoyment of which will be imperiled by the threatening acts of the defendant is the measure of the value of the matter put in controversy by it. If any other test than this should be substituted, very many suitors would be debarred from seeking the protection of the Federal courts. * * *

"What would become of suits for the reformation of a written agreement, for the cancellation of alleged forged or fraudulent deeds, for the specific performance of contracts to convey lands, and many others of like character if upon questions of jurisdictional value of the matters in controversy the courts were limited to the pecuniary value of the deed, the contract, the agreement as such, and were barred from considering the value of the thing affected by or the subject-matter of these various writings?"

Thus in a suit nominally for rent, but the result of which will be to settle title to land, the value of the land is to be considered.

Stinson *vs.* Dousman, 20 How., 461; 15 L. ed., 966.
American Fertilizer Co. *vs.* Bd. Agric., etc., 43 Fed. Rep., 609; 11 L. R. A., 179.

The object of this action is to recover an entire block of land, valuable principally in its entirety.

The defendant cannot take the heart of the land without its true value as a part of the whole being considered.

There was error in the judgment of the court below.

Respectfully submitted.

CHARLES SEYMOUR,
Counsel for the Plaintiffs in Error.

WETMORE *v.* RYMER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 76. Submitted November 1, 1897. — Decided January 17, 1898.

In an action of ejectment the question whether the land in dispute is of sufficient value to give a Circuit Court jurisdiction is purely one of fact, and the statutes regulating jurisdiction leave the mode of trying such issues to the discretion of the trial judge.

Whether he elects to submit such issue to a jury, or to himself hear and determine it without the intervention of a jury, in either event the parties are not concluded by the judgment of the Circuit Court.

In this case the question was passed upon by the court below on affidavits, and the judgment dismissing the action for want of jurisdiction is reviewable here.

A suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.

THIS was an action of ejectment, brought in the Circuit Court of the United States for the Eastern District of Tennessee, to recover a tract of land in Polk County. The declaration alleged that the land was worth more than two thousand dollars. The defendants disclaimed as to a portion of the

land, and pleaded not guilty and the statute of limitations as to the remainder.

At the trial, after the plaintiffs' evidence was closed, the defendants moved the court to dismiss the plaintiffs' suit for want of jurisdiction because it appeared that the matter in dispute did not exceed, exclusive of interest and costs, the sum or value of two thousand dollars; but the court suspended action on this motion until the verdict of the jury should be rendered. The defendants then proceeded to introduce their evidence on the matters put in issue by the pleadings, and, after argument of counsel and the charge of the court, the jury found a verdict in favor of the plaintiffs, and assessed their damages for the detention of the premises at one dollar. Thereupon the court rendered judgment on the verdict and a writ of possession and execution accordingly.

But, immediately upon the rendition of the verdict and judgment, the court set them aside, entertained the defendants' motion to dismiss for want of jurisdiction, and gave leave to both parties to file affidavits showing the value of the land in controversy.

Upon consideration of the evidence heard on the trial and of affidavits produced on behalf of the plaintiffs, the court, being of opinion that the value of the matter in dispute was less than two thousand dollars, and that there was not a substantial controversy between the parties of sufficient value to be within the jurisdiction of the court, dismissed the suit for want of jurisdiction, and rendered judgment for costs against the plaintiffs. The plaintiffs excepted to this action of the court; a bill of exceptions was sealed; and a writ of error was allowed to this court.

Mr. Charles Seymour for plaintiffs in error.

No appearance for defendants in error.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

The first question that arises upon this record is whether

the action of the Circuit Court in dismissing the plaintiffs' action for the want of jurisdiction is reviewable by us. The court acted in pursuance of the fifth section of the act of March 3, 1875, c. 137, 18 Stat. 470, 472, which provided, "that if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal as the case may be."

By the sixth section of the act of August 13, 1888, c. 866, 25 Stat. 433, 436, amending the act of March 3, 1887, it was enacted "that the last paragraph of section five of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts, and for other purposes,' and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed."

Any doubt that may have been caused by this repealing enactment, as to the power to review the judgment of a Circuit Court dismissing a suit for want of jurisdiction, was removed by the act of February 25, 1889, c. 236, 25 Stat. 693, entitled "An act to provide for writs of error or appeals to the Supreme Court of the United States in all cases involving the question of the jurisdiction of the courts below," and which provided "that in all cases where a final judgment or

decree shall be rendered in a Circuit Court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions as apply to other writs of error or appeals. . . ."

This act of February 25, 1889, was followed by the act of March 3, 1891, c. 517, 26 Stat. 826, which provided, in its fifth section, "that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

These provisions of the several statutes plainly disclose the intent of Congress that a party whose suit has been dismissed by a Circuit Court for want of jurisdiction shall have the right to have such judgment reviewed by this court. And we have accordingly heretofore held that the action of the Circuit Courts in such cases is subject to our revision. *Williams* v. *Nottawa*, 104 U. S. 209; *Barry* v. *Edmunds*, 116 U. S. 550; *Hartog* v. *Memory*, 116 U. S. 588; *Morris* v. *Gilmer*, 129 U. S. 315; *Deputron* v. *Young*, 134 U. S. 241; *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327.

The question raised by this writ of error is whether the Circuit Court erred in dismissing the plaintiffs' suit for the alleged reason that the value of the property in dispute did not amount to the sum of two thousand dollars, exclusive of interest and costs, and that, therefore, such suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court; and, as prescribed by the fifth section of the act of March 3, 1891,

such question of the jurisdiction of the Circuit Court alone is presented for our decision. *Shields* v. *Coleman*, 157 U. S. 168.

The question whether the land in dispute was of a value sufficient to give the Circuit Court jurisdiction was purely one of fact, and as that question was not submitted to the jury, but was passed on by the court upon affidavit, it is now suggested that, upon a writ of error, this court cannot consider the facts disclosed by the affidavits, but is restricted to any errors of law shown by the record.

Undoubtedly, the general rule is that, upon a writ of error, only matters of law appearing on the face of the record can be considered, and that evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law; and ordinarily a bill of exceptions lies only upon some point arising either upon the admission or rejection of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. *Arthurs* v. *Hart*, 17 How. 6.

The difficulty arises out of the peculiar character of the legislation which we are now considering. Prior to the passage of the act of 1875 questions going to the jurisdiction of the court could only be raised by a plea in abatement in the nature of a plea to the jurisdiction. See *Farmington* v. *Pillsbury*, 114 U. S. 138, and cases there cited. If such a plea presented a question of law upon the face of the record, this court could review the decision of the court below upon such question of law. If the plea asserted matters of fact *dehors* the record, it was open for the parties to agree upon a statement of facts, or to take exceptions to the rulings of the court in admitting or rejecting evidence offered to the jury or in giving instructions, and in either event only questions of law would be presented for our decision.

But, under the act of 1875, the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist. *Williams* v. *Nottawa*, 104 U. S. 209; *Barry* v. *Edmunds*, 116 U. S. 550; *Morris* v. *Gilmer*, 129 U. S. 315; *Deputron* v. *Young*, 134 U. S. 241. And our present problem is to preserve as well the power of the trial court to make such inquiries as the right of suitors, so expressly reserved to them in the statutes, to have the action of the lower court reviewed by the Supreme Court of the United States.

In equity cases, which come up on appeal, and where the evidence on which the court below acted is presented here, the action of that court can be readily reviewed. But in cases at law, like the present one, how can we review the judgment of the court below, unless that judgment is either based on the verdict of a jury or upon facts found in an agreed statement?

The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question, when raised, shall be determined.

When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different States, or when, as in the present case the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied.

In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury. The action of the court, in the admission or rejection of evidence, or in instructing the jury, would thus be subjected to the review by this court which was intended by Congress.

Such was the course pursued in the case of *Jones* v. *League*,

18 How. 76. That was an action at law to try title to land. League, the plaintiff, averred himself to be a citizen of Maryland, the defendants being citizens of Texas. By a plea in abatement the defendants alleged that, at the time of the commencement of the suit, League was a citizen of Texas. On this plea the plaintiff took issue, and a trial of that issue was had, which resulted, under the instructions of the court, in a verdict of the jury for the plaintiff. The case was brought up, by a writ of error, to this court, where the validity of the instructions given by the trial court was considered.

A similar course was followed in the case of *Chicago & Northwestern Railway* v. *Ohle*, 117 U. S. 123. There, an action had been brought by Ohle in a state court of Iowa against the railway company, which took the case by a removal petition into the Circuit Court of the United States, on the ground that Ohle was a citizen of Iowa and the railway company a citizen of Illinois. Ohle was permitted by the Circuit Court to file a plea in abatement or to the jurisdiction, alleging that both he and the railway company were citizens of Illinois. Upon this plea issue was joined, and a trial had with a jury; and the cause was brought to this court by a writ of error, where the instructions of the court to the jury were reviewed and the judgment affirmed.

But the questions might arise in such a shape that the court might consider and determine them without the intervention of a jury. And it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge.

But whether the judge shall elect to submit the issues to the jury, or to himself hear and determine them, it is the manifest meaning of this legislation that, in either event, the parties are not to be concluded by the judgment of the Circuit Court. As we have already said, if the questions are submitted to the jury, there will be a ready remedy, by proper exceptions and a writ of error, to correct any errors into which the trial court may have fallen. And if the court takes to itself the determination of the disputed questions, it is imperative, in order to give effect to the intention of Con-

gress, that its action must take a form that will enable this court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court.

Thus in *Barry* v. *Edmunds*, 116 U. S. 550, where the judgment of the Circuit Court, dismissing a cause because in its opinion the matter in dispute did not amount to the jurisdictional value, was reversed, it was said:

"In making such an order therefore the Circuit Court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of the cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said Circuit Court.'" In *Hartog* v. *Memory*, Ib. 588, it was said: "No doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition. But the evidence on which the Circuit Court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the appellate jurisdiction of this court for the review of the order of dismissal. And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff

should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence."

And this language from *Barry* v. *Edmunds* was quoted with approval in the case of *Deputron* v. *Young*, 134 U. S. 252.

This court must, therefore, consider whether the judgment of the Circuit Court, dismissing the suit for want of jurisdiction, was warranted by the facts of the case as they are disclosed in the record.

The declaration was as follows:

"The plaintiff, George Peabody Wetmore, who is a citizen of the State of Rhode Island; Matilda C. Alloway, a citizen and resident of the State of Pennsylvania; V. K. Stevenson, Hugh Stevenson, Paul E. Stevenson, Eloise Stevenson Kernochan and James L. Kernochan, her husband, and Maxwell Stevenson, by Paul E. Stevenson, his next friend, all of whom are citizens and residents of the State of New York, sue the defendants, David Rymer, Sam. Rymer, Tom Payne and W. Calvin McConnell, all of whom are citizens and residents of Polk County, Tennessee, to recover the following-described lands, situate in the county of Polk, in the southern division of the eastern district of Tennessee, to wit:

"In town. one, range three east, of the basis line, Ocoee district.

"The south half of section one, the south half of section two, the northwest quarter of section eleven, all of section twelve, the southwest quarter of section thirteen.

"In town. two, range four east, of the basis line, Ocoee district.

"All of sections one and two and three and five and eight and nine and ten and eleven and twelve and thirteen and fourteen and fifteen and seventeen and twenty and twenty-one and twenty-two and twenty-three and twenty-four and twenty-five and twenty-six and twenty-seven and twenty-eight and thirty-three and thirty-four and thirty-five, the north half and the southeast quarter of section six, the east half of section seven, the east half of section eighteen, the east half and the northwest quarter of section nineteen, the

north half and the southeast quarter of section twenty-nine, the east half of section thirty-two, the west half of the west half of section thirty-six.

"In town. one, range four east, of the basis line, Ocoee district.

"All of section thirty-one and thirty-five and thirty-six, the west half of section thirty-four.

"As shown on the general plan of the Ocoee district of the State of Tennessee, to which and the grants for said land reference is made for full description.

"Which lands are worth more than two thousand dollars and of which lands said plaintiffs were possessed, claiming in fee, before the commencement of this suit, and after said possession accrued the said defendants, on the first day of January, 1892, entered thereupon and unlawfully withhold and detain the same, together with one thousand dollars due for the detention thereof."

The plea was as follows:

"And now comes the defendant, David Rymer, and for plea to plaintiffs' declaration says that he is not in possession of and does not claim and has not entered upon or been in possession of or claimed any part of the lands in said declaration described, except the following described lands, to wit: The southwest $\frac{1}{4}$ of section 17, the north $\frac{1}{2}$ of section 20, the east $\frac{1}{2}$ and southwest $\frac{1}{4}$ of section 18, and the northeast $\frac{1}{4}$ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Tennessee; and as to all the lands except those herein described this defendant here and now disclaims any and all interest, right or title.

"And for further plea in this behalf said defendant says that as to the said southwest $\frac{1}{4}$ of section 17, the north $\frac{1}{2}$ of section 20, the east $\frac{1}{2}$ and southwest $\frac{1}{4}$ of section 18, and the northeast $\frac{1}{4}$ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Polk County, Tennessee, he is not guilty in manner and form as the plaintiffs in their said declaration have alleged; and of this put himself upon the country."

The verdict and judgment were for all the lands claimed in

the declaration, being a connected body of land of about 25,000 acres. The plea claimed right of possession to between one and two thousand acres. The evidence upon which the court passed was restricted to the value of the land claimed by the defendants. And it is urged on behalf of the plaintiffs that the value of the entire tract claimed in the declaration and recovered by the verdict should have been considered in passing upon the question of the value of the matter in dispute; that, while the disclaimer may estop the defendants, it does not deprive the plaintiffs of their right to a verdict and judgment for the entire tract claimed, upon which a writ of possession may issue; that judgment in ejectment is conclusive as to title so far as the parties are concerned.

But we do not consider it necessary to consider or decide this contention, because we are of opinion that the evidence sufficiently disclosed, for the purposes of maintaining jurisdiction, that the value of the land claimed in the plea exceeded the sum of two thousand dollars. As that evidence is brief it seems proper to state it in the very form in which it appears in the bill of exceptions.

At the trial and before the jury rendered their verdict, the plaintiffs introduced as a witness one Oscar W. Muller, who testified that he was a surveyor and had surveyed the lands for the plaintiffs. On cross-examination by defendants' attorney he testified that the market value of the land was fifty cents per acre; that it was wild or mountain land, and not worth more than that unless its prospective value was to be considered, and that the land described in the plea of the defendants was not worth $1000.

After the verdict and judgment, and upon the motion made to dismiss, the plaintiffs filed the affidavit of Charles Seymour, who testified that he was the attorney and had been for twenty-five years the agent of what are known as the Wetmore and Stevenson lands, in Polk County, Tennessee, and that he is familiar with most of the lands and has been on the lands in dispute in this cause, and that the lands set out in the plea of the defendants lie on Lost Creek and Little Lost Creek, and form a connecting way to many thousands of acres of land of

the plaintiffs, which lie in that vicinity, and that the lands described in this plea are worth more than $2000 on account of their location, and are not to be judged by the general price for mountain land in the vicinity; that these lands lie near the foot of Frog Mountain, on the northwesterly side, where the timber is more than usually heavy and unusually valuable, both for accessibility and quality.

The plaintiffs likewise filed the affidavit of J. B. Brock, in which he testified as follows:

"I have lived in Polk County over forty years; was sheriff for six years, and have herded cattle for about twenty-five years on and in vicinity of lands set out in defendants' plea, and I know the location of some twenty thousand acres lying near by, understood to be the property of Wetmore and Stevenson heirs, the plaintiffs in this suit. The lands described in the plea are worth much more than the ordinary mountain lands. I sold a quarter section of 160 acres lying a mile from the lands in the plea for $400, and the lands described in the plea are near the foot of the mountain, where the timber is better than on most of the mountains; and the way they lie, if I owned the Wetmore and Stevenson lands, I would not want to sell at all, as they are part of a large boundary that would be needed for shelter of cattle off the mountain and for roadways, and control of the ways to the herding grounds or timber work, or if mining be done would be in the way. Not long before the defendant took the lease in 1888 from Wetmore and Stevenson he offered to make me a deed for some land a mile and a half from any land in his present plea in this suit."

The plaintiffs likewise filed the affidavit of O. W. Muller, who, having testified that he has been county surveyor for Polk County for a number of years, and has surveyed the lands in dispute, and also surrounding lands, said:

"While I value the mountain land as a whole at fifty cents per acre, the land in litigation, lying on the waters of Lost Creek and Little Lost Creek at the foot of the mountain, forms part of a connected body of land of about twenty-five thousand acres, and forms a gateway and outlet to this body

for timber and stock to the Hiwassee River and railroad, without which the rest of the body would be materially reduced in value, say from ten to twenty cents per acre. To cut this off and permanently block this approach would reduce the value of the whole from two to four thousand dollars."

The defendants filed no affidavits and adduced no evidence on the question of value, but appear to have relied wholly on the statements of O. W. Muller when under cross-examination at the trial.

It is not easy to see upon what sound view of this evidence the learned judge of the Circuit Court deprived the plaintiffs of their verdict and judgment. There was no pretence that the plaintiffs had fraudulently overstated the value of the land in order to confer jurisdiction.

It does not seem to have occurred to the defendants that the land which they claimed was not worth $2000, until, at the trial, their attorney caught at the statement of one of plaintiffs' witnesses that he estimated wild mountain land at fifty cents an acre. When the court gave leave to both parties to file affidavits showing the value of the lands in controversy, the defendants were unable or unwilling to make or procure to be made a single statement under oath on the subject of the inquiry. A liberal presumption ought, therefore, to be indulged in favor of the plaintiffs' evidence in that regard. It is well known that there is no matter in respect to which the judgments of men more widely differ than in regard to the value of real estate.

We give no weight to that portion of the plaintiffs' evidence that goes to show damage to the balance of their lands by an adverse occupancy of the land claimed by the defendants. But looking only at the evidence bearing strictly on the value of the controverted lands, it seems obvious that while the market value of the wild mountain land generally was estimated by one of the witnesses at fifty cents an acre, yet it was testified by several witnesses that these particular lands possessed a special value by reason of their location at the foot of the mountain, and because the timber on them was more than usually heavy and valuable both for accessibility

and quality. Charles Seymour, who had been familiar with the lands for twenty-five years as agent for their owner, testified that the lands described in the plea were worth more than $2000 on account of their location and the quality of their timber, and were not to be adjudged by the general price for mountain land in the vicinity.

It is unnecessary to quote authorities to show that, in estimating the market value of land, everything which gives it intrinsic value is a proper element for consideration; not only its present use but its capabilities are to be considered. Even unimproved land lying at the foot of a mountain range is obviously more valuable than similar lands less eligibly situated.

Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant a dismissal of the action for the want of jurisdiction.

The judgment of the Circuit Court dismissing the action is accordingly reversed, and the cause is remanded with directions to restore the judgment on the verdict.